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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 67.

J. I. CASE COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD.

INTRODUCTORY STATEMENT.

Respondent, National Labor Relations Board, has filed herein its brief setting forth at length the grounds upon which it asks the Court to affirm the decision of the United States Circuit Court of Appeals for the Seventh Circuit. The purpose of this reply brief is to invite the Court's attention to certain statements made and arguments advanced

by the Board. For convenience, the matters presented in this reply brief will be in the order in which they appear in the brief filed on behalf of the National Labor Relations Board.

QUESTIONS PRESENTED.

1. It will be noted that the National Labor Relations Board now agrees with the position of Petitioner—that the issues in this case are not moot but should be decided by the Court.

2. Question No. 2 as stated by the Board on page 2 of its brief is as follows:

> "Whether, after the Board has certified an exclusive collective bargaining representative, an employer may refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts theretofore executed with a majority of its employees."

Petitioner calls attention to the fact that the question so stated implies that Petitioner did refuse to bargain collectively with respect to the terms and conditions of employment covered by individual contracts; but, in fact, the Board does not contend nor does the record show, that any request was specifically made to the employer at any time to bargain collectively with respect to the individual contracts. The demand for collective bargaining made upon Petitioner following certification of the Union as the bargaining agency was without reference to the individual contracts, and at no time did the collective bargaining agent in any way recognize the existence of such individual contracts of employment. The demand upon Petitioner was to bargain without regard to such contracts.

ARGUMENT.

The Board's brief narrows the essential issue before the Court. The Board now contends that the National Labor Relations Act "evidences the Congressional intent to supersede individual by collective bargaining." (Brief, 23) For the Court to sustain the order of the Board in the present proceeding, it would indeed be necessary to adopt that view regarding the effect of the National Labor Relations Act upon individual contracts of employment. The Court is, therefore, faced with the necessity of either reaffirming its decision in *N. L. R. B.* v. *Jones & Laughlin Steel Corporation* (301 U. S. 1) upholding the right of individual contract, or of overruling that decision and adopting the Board's contention that there is no such thing as a right of individual contract where a collective bargaining agent has been chosen.

The Board urges several apparently inconsistent positions in its brief. It asserts that the National Labor Relations Act evidences the Congressional intent to supersede individual by collective bargaining and that when a majority of the employees in an appropriate bargaining unit have selected a collective bargaining agent, the right of individual contract by employees in that unit is automatically terminated; but its order in the present proceeding does not treat individual contracts as completely abrogated. The order undertakes merely to relieve one party to the individual agreements of any obligations under them, but to hold the other party liable in all respects for discharge of its obligations under the contracts. (Record, 26)

The Board's attempted interpretation of the language used by this Court in the *Jones & Laughlin* case with respect to the right of individual contract is extremely interesting. The Board construes the language as meaning that the selection of a collective bargaining agent under the National Labor Relations Act automatically terminates all right of individual bargaining by employees within the unit,

but that the collective bargaining agent may, if it so desires, "* * allow individuals within the unit to bargain individually respecting matters peculiarly of concern to them" (Brief, 27). That is to say—the Board maintains that although the right of individual bargaining is extinguished when a collective bargaining agent has been selected, such right of individual bargaining may be revived by permission of the bargaining agent. It is indeed a peculiar construction of the language in the *Jones & Laughlin* case to say that the Court intended any such result. We cannot believe that the Court intended to adopt the view that the right of individual bargaining is extinguished merely because a majority of employes within the bargaining unit elect to bargain collectively. Neither can we conceive that the Court intended to recognize in the bargaining agent so chosen a right to withhold from or to confer upon employees within the unit the privilege of bargaining individually.

This Court, in the *Jones & Laughlin* case, was speaking of rights which employees had before the National Labor Relations Act was passed, and which the Court said the Act in no way destroyed. The Court was aware that if the statute should be construed to deprive employers and individual employees of the right to enter into employment contracts during the existence of a collective bargaining representative, its Constitutionality would be in doubt. The language used by the Court shows that the Court sought an interpretation of the statute which would not interfere with an individual's right of contract guaranteed by the Constitution. The Board, however, here urges a construction of the law which would destroy that right, or at least suspend it during the existence of a collective bargaining representative.

The Board quotes with approval, on page 59 of its brief, a statement attributed to Thomas N. Carver to the following effect:

> "The fundamental principle involved in the trade-union policy of the present is the substitution of the

indispensable group as a bargaining unit for the *dispensable individual.*" (Italics supplied)

For the Court to sustain the view of the Board as urged in its brief, it would be necessary to adopt the philosophy so stated—namely, that the group is indispensable, the individual dispensable, and that the latter has no rights which can be maintained in the face of collective action by others. The Board maintains that "Congress had in mind, not a mere disparity in strength between the individual employee and his employer, but rather a complete incapacity of the employee to participate in the process of realistic negotiations with his employer" (Brief, 20). If Congress had this in mind it failed to disclose it in the specific language of the National Labor Relations Act and this Court apparently failed to discover such Congressional intention when it was considering the right of individual contract in the *Jones & Laughlin* case. And the Board is obviously inconsistent when it refers to the incapacity of the employee to contract with his employer but insists upon his capacity to select an agent for the purposes of collective bargaining.

Furthermore, this Court has had occasion, since the passage of the National Labor Relations Act and the decision in *Jones & Laughlin*, to consider and uphold specifically not only the capacity but the right of an employee to make an individual contract with respect to his wages and hours. (*Walling* v. *A. H. Belo Corp.*, 316 U. S. 624.)

Moreover, the Board has conceded the capacity of the individual employees to contract with *this* employer with respect to wages, hours and working conditions. The Board does not contend, and has never contended, that the individual employment contracts made between Petitioner and its employees were invalid in their inception. It is therefore difficult to see how the Board, having conceded the validity of those contracts in their inception, can still maintain that all of the employees in the bargaining unit became legally incapable of contracting individually when a

majority of the employees in the unit elected to deal collectively with the employer.

The Board argues that the effect of the position taken by the Petitioner is to deprive the employees who had individual contracts of employment of their right to bargain collectively regarding terms and conditions of employment included in such contracts, and refers in support of its position to a line of cases holding that the existence of a collective bargaining agreement does not prevent the collective bargaining agent from negotiating changes in such an agreement, and which impose upon the employer the duty to bargain with the chosen representative regarding such changes (Brief 33-36). In advancing this proposition the Board entirely misconstrues the position of the Petitioner. At no stage of the proceedings did the Petitioner contend that the employees holding such individual contracts could not bargain respecting changes in their contracts. This issue was not presented. The Union's position was clear that the individual contracts were of no effect or validity and thus were not entitled to recognition for any purpose. As Petitioner stated in its brief in the Circuit Court of Appeals, the employees could negotiate changes in their individual contracts of employment, either individually or collectively, but since the contracts were validly made with individuals the Petitioner, of necessity, would have to know the particular contracts in which changes were sought. Manifestly, the collective representative could not negotiate changes in such individual contracts unless it specified the contracts which it sought to change. And we have pointed out in our brief (page 15) that on the basis of the result of the ballot, all of the employees having individual contracts of employment could not have voted for the collective representative and that a number of employees obviously preferred to assert their individual contracts of employment.

The Board also states in its brief that the Petitioner's position is analogous to those cases wherein by contract

the employee agrees not to bargain collectively or associate with others for that purpose, thus seeking to bring the case within the rule of *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350. In answer to this, Petitioner states that it has at no time in this proceeding or subsequent to the election held under the auspices of the Board, denied in any way the existence of the Union as the collective bargaining representative of the employees, nor has it asserted any legal flaw in the selection of the collective bargaining representative by reason of the existence of the individual contracts. Petitioner's sole contention is that the individual contracts, concededly valid, must be accepted as such in connection with the collective bargaining process.

The Board undertakes to place Petitioner in the position of contending that the right of individual contract is an absolute right which may be exercised under any and all conditions and for any and all purposes (Brief, 41). This is *not* the position of Petitioner because it recognizes that the right of individual contract, like all other rights, is relative, not absolute.

There appears to be no difference between Petitioner and the Board with respect to the existence of a right of individual contract, where the contract is valid in its inception and contains no provisions repugnant to the National Labor Relations Act (Brief, 48, 49). That being true, it is difficult to understand why the Board cites as authority for its present position the line of cases in which the right of individual contract has been limited because the contracts were invalid or were utilized for the purpose of defeating the statutory purpose. The Board has never contended, and does not now contend, that the individual contracts made between Petitioner and its employees were invalid, either because of the conditions under which they were made or because of provisions in such contracts repugnant to the Act. In other words, although Petitioner recognizes as fully as does the Board that the right of individual contract is not an unlimited right, it maintains, and the Board does not deny, that the right was lawfully exercised in the

present instance. Petitioner submits that the conditions which would justify a limitation on the right of individual contract and which have prompted the courts in the cases cited by the Board (Brief, 34, 35) to decline to give effect to individual contracts, do not exist here.

To summarize, Petitioner's contention is that the individual contracts here involved were valid in their inception and in their terms; that they did not undertake to preclude subsequent collective bargaining; that Petitioner did not use said contracts for the purpose of frustrating any rights secured by the National Labor Relations Act; and that there is no basis for declining to give effect to such contracts unless the Board is correct in its contention that such contracts are automatically vitiated when a bargaining agent duly designated by a majority of employees in the bargaining unit demands collective bargaining.

The Board contends that its order does not deprive Petitioner and its individual employees from entering into individual contracts of employment except where the purpose is to utilize them, or where the probable consequence would be their utilization, for "infringement of the collective bargaining process" (Brief, 48, 49). However, since the record shows that the contracts here under consideration were not entered into for such improper purpose and were not utilized for the "infringement of the collective bargaining process," it is difficult to conclude that the Board's order in fact recognizes any future right of individual contract between Petitioner and its employees. The right is, to say the least, illusory, if it can only be exercised under peril of another proceeding and order similar to the present one.

Respectfully submitted,

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December, 1943.